IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 264 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMILABEN RATILAL SHAH - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MRS.SWATI SOPARKAR FOR MR SN SOPARKAR for Petitioner No(s).: 1.
MR B.B.NAIK for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 21/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal , Ahmedabad Bench 'C' has referred the following three questions under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the assessee.

> *"1 Whether, in the facts and circumstances of the case, the Tribunal was right in holding that reopening of the assessment u/s.147(a) of the I.T.Act, 1961 could not be reagitated after the said point was consciously waived by the assessee vide letter dated 10th August,1990 submitted to the CIT(A)?*
>
> *2 Whether, on the facts and circumstances of the case the Tribunal was right in law in holding that the assessing authority had jurisdiction to initiate proceedings for reassessment u/s.147(a) of the Act?*
>
> *3 Whether, on the facts and circumstances of the case, the Tribunal was justified in confirming the addition of Rs.1,85,900/- representing the difference between purchase price of the first floor of the house property at Athugar Street, Nanpura, Surat as recorded in the seized diary and the purchase price shown in the agreement for purchase of the said property?"*

2 The Assessment Year is 1984-85 and the relevant accounting period is S.Y.2039. The assessee filed return of income on 30/6/1984 declaring total income of Rs.37,510/-. The said return was accepted under

Section 143(1) of the Act vide order made on 21/1/1987.

3 On 6/11/1985 the residential premises of the assessee were subjected to search and seizure proceedings under Section 132 of the Act. A notice came to be issued under Section 148 of the Act and was served on 31/3/1989. The assessee submitted a return of income in response to the aforesaid notice and declared identical income as was shown in the original return of income. During the course of search proceedings one diary viz., a telephone diary consisting of 53 pages came to be seized. The following note appeared on the last page of the said diary :

> *"S.Y.2039 Sravan-sud-5 and Saturday dtd.13.3.83 (August), the first floor of the house property at Athugar Street, Nanpura, Surat admeasuring about 1512 sq.ft. Purchased from Shri Jagdishbhai for Rs.3,76,121/-. An agreement to sale dt.7.10.1983".*

Original note was in Gujarati and the above reproduction is stated to be a verbatim translation.

4 During the relevant accounting period the

assessee entered into an agreement for sale on 7/10/1983 whereunder the assessee agreed to purchase property situated at 1st Floor of residential house at Athugar Street, Nanpura, Surat. The agreement showed that it was agreed between the parties to purchase the flat for a total sum of Rs.1,76,121/-. As per balance sheet furnished by the assessee as well as Wealth Tax Return filed by the assessee it was found that a sum of Rs.76,121/- had been paid towards purchase price till the end of the accounting year under consideration. In the succeeding year viz., S.Y.2040, relatable assessment year 1985-86, final sale deed came to be executed on 31/8/1984 and the assessee made balance payment of Rs.1,00,000/-. This is apparent from the property account appearing in the Books of Account of the assessee. At the time of execution of the sale deed a sum of Rs.14,100/- was incurred towards expenditure for stamp paper, registration etc. Thus the total cost of the property as reflected in the wealth tax return for Assessment Year 1985-86 came to Rs.1,90,221/-.

5 As the seized diary denoted the purchase price to be Rs.3,76,121/-, the Assessing Officer, in the course of reassessment proceedings rejected the explanation tendered by the assessee and added a sum of Rs.1,85,900/- being the difference between actual consideration and apparent consideration. It was held by the Assessing Officer that this sum represented the component of 'on money' which the assessee had paid for purchasing the property. The addition was made under Section 69 of the Act vide order dated 28/2/1990.

6 The assessee carried the matter in Appeal before CIT (Appeals), who confirmed the assessment order vide his order dated 10/8/1990. The assessee had raised two fold challenges before Commissioner (Appeals): first one was relatable to the validity of proceedings initiated under Section 147(a) of the Act, and the second one was in relation to merits of the addition of Rs.1,85,900/-. The Commissioner (Appeals) recorded that the first

challenge as to initiation under Section 147(a) of the Act was not pressed.

7 The assessee carried the matter in appeal before the Tribunal. The issue regarding challenge to initiation of proceedings under Section 147(a) of the Act was specifically raised and urged before the Tribunal. However, the Tribunal rejected the said contention holding that the assessee having waived the contention before the First Appellate Authority could not be permitted to reagitate the same contention before the Tribunal. The Tribunal also rejected various contentions raised on merits of the addition for the reasons stated in its order dated 9/3/1992.

8 Assailing the order of the Tribunal it was urged by Mrs.Soparkar that the Tribunal had committed an error in law in not permitting the assessee to agitate the ground regarding initiation of reassessment proceedings. That the said issue was a legal issue and went to the root of the matter;

that it was incumbent upon the Tribunal to deal with the same on merits. The assessee could not have been non-suited on the ground that the assessee had given up the said contention before the First Appellate Authority. In support of her submission she placed reliance on decision of this Court reported in case of *P.V.Doshi Vs. Commissioner of Income Tax, (1978) 113 ITR 22.*

8.1In relation to the second question it was submitted that the assessee had declared full and true facts in the return of income, and even otherwise, when the reassessment proceedings were initiated, all the relevant and necessary facts were on record before the respondent authority. It was submitted that proceedings under Section 132 of the Act had taken place on 6/11/1985 when the diary came to be seized while the original assessment under Section 143(1) of the Act had been completed on 21/1/1987. Therefore, the default, if any, was committed by the assessing authority and for that the assessee could not be

held liable and thus reassessment was bad in law.

8.2 On merits it was submitted that all the authorities, including Tribunal, had failed to appreciate the facts and evidence in the proper perspective by shifting the onus on the assessee when in fact the onus was on the department. It was submitted that in the statement recorded under Section 132(4) of the Act at the time of search both the assessee and her husband had denied having made any extra payment by way of sale consideration; seller had also denied having received any extra money; the assessee had filed an affidavit during the course of reassessment proceedings wherein she had categorically stated that she had not paid anything over and above what was reflected in the document showing conveyance of the property; and the hand writing in the seized diary did not belong to the assessee or her husband; note in the seized telephone diary had no evidentiary value and it could not override the evidentiary value of the agreement for sale, the

sale document and the Books of Account maintained by the assessee. That whosoever was the author of the noting made in the diary had committed an error in writing Rs.3,76,321/- instead of Rs.1,76,121/-. Therefore, in face of this evidence, even if the burden was on the assessee, the same stood discharged and the department was required to file cogent evidence in rebuttal and conclusively establish by bringing positive material on record to prove existence of any unaccounted investment. That the authorities had failed to appreciate that in relation to the transaction in question the assessee had submitted Form No.37G as prescribed under the Income Tax Rules, 1962 but no acquisition proceedings had been commenced by the department. On the basis of this it was contended that the respondent ought to have undertaken an exercise to correctly evaluate the market value of the property before treating the amount mentioned in the noting on the last page of the diary as being the sale consideration. She placed reliance on decision of the Apex Court in the case of *Dhakeswari Cotton Mills*

Ltd. Vs. Commissioner of Income Tax, (1954) 26 ITR 775 and the decision of the High Court of Assam in the case of Rajmohan Saha and others Vs. Commissioner of Income Tax, (1964) 52 ITR 231 with special reference to observations at page 234 of the report. She therefore urged that the Tribunal's order was not only erroneous but was one which no reasonable person can make in the facts and circumstances of the case and was therefore required to be set aside deleting the addition in toto.

9 Mr.B.B.Naik appearing on behalf of the respondent submitted that the Tribunal had recorded various findings of fact after appreciating evidence on record and no interference was called for. He, therefore, urged that the Tribunal's order be upheld.

10 In sofar as question No.1 is concerned the Tribunal's order cannot be permitted to stand. In the case of P.V.Doshi (supra) this High Court in almost identical fact situation held that the conditions

prescribed for initiating reassessment proceedings are mandatory and therefore there could never be a waiver of a mandatory provision. That jurisdiction could not be conferred on the authority by mere consent, but only on fulfillment of conditions precedent for the exercise of jurisdiction. If jurisdiction could not be conferred by consent, there would be no question of waiver, acquiescence or estoppel or the bar of res-judicata being attracted because the order in such a case would lack inherent jurisdiction and would be a void order or a nullity. Therefore, in the facts of the present case the Tribunal had wrongly come to the conclusion that the assessee had waived its right to challenge reassessment proceedings before Commissioner (Appeals), and was thus not entitled to raise the said challenge before the Tribunal.

11 As the facts reveal the assessee had challenged the reassessment before CIT (Appeals) on the ground that on the date of issuance of notice under Section 148 of the Act, the original return submitted on

30/6/1984 was yet pending and hence no reassessment proceedings could be initiated. This challenge was based on the fact that the assessee had not received any order/intimation under section 143(1) of the Act. However, before the Commissioner (Appeals) the Assessing Authority vide letter dated 8/8/1990 submitted that assessment under Section 143(1) of the Act had been completed on 21/1/1987. It was on the basis of this communication that the representative of the assessee had not pressed the aforesaid point before CIT (Appeals). The Tribunal has wrongly treated this as a conscious waiver on the part of the assessee. In fact the Tribunal failed to appreciate that the challenge to reassessment proceedings before the Tribunal was on entirely different grounds and had nothing to do with pendency of the original return, once the assessee having come to know that original assessment had been framed before issuance of notice under Section 148 of the Act.

12 In these circumstances, question No.1 is answered in the negative i.e., in favour of the

assessee and against revenue.

13 In sofar as question No.2 is concerned, the facts on record go to show that the assessee cannot succeed. The original assessment had been completed under Section 143(1) of the Act accepting the returned income. Though this order was made on 21/1/1987 and the search proceedings took place on 6/11/1985, there is nothing on record to show that while framing the original assessment the Assessing Authority had any material before it which would indicate that there was escapement of income. As recorded in the assessment order it is only subsequently on perusal of the seized diary that the Assessing Officer came in possession of the information and thereafter verification of the assessment record was carried out. Noting in the diary constituted sufficient information for the Assessing Authority to form a prima facie opinion that there was escapement of income by either non-declaration of correct sale consideration or there was furnishing of inaccurate particulars as regards

sale consideration. Therefore, the Tribunal was justified in holding that the assessee had failed to disclose fully and truly all material facts necessary for the assessment of the relevant assessment year.

14 The second question therefore is answered in the affirmative i.e., in favour of the revenue and against the assessee.

15 Coming to the third question which deals with the merits of the addition suffice it to state that the Tribunal has recorded various findings of facts and it is not possible to state that the said findings are erroneous in any manner whatsoever. The seized diary was recovered from the residential premises of the assessee. The noting on the last page of the said diary is very eloquent in as much as, it gives complete particulars of the property purchased including area of the property. Therefore, the contention of the assessee that there was a mistake in mentioning the amount of sale consideration does not merit acceptance. The details

denoting dates, both as per the English calendar and the Hindu calendar, area of the property, description of the property belie such a claim that there could be mistake committed by the author of the note.

15.1 It is also necessary to take note of the fact that the seized diary was recovered from the possession of the assessee and/or her husband. All other pages except the last page, are in hand writing of the husband of the assessee and this fact is accepted both by the assessee and her husband in their respective statements recorded under Section 132(4) of the Act at the time of search. In such circumstances the burden was on the assessee to explain as to who had made the noting on the last page. Both the assessee and her husband have stated that they are not aware as to who is the person who has made such noting in the diary seized from their residence, from their possession. The ownership of the diary has not been denied by either of them. Therefore, under Section 132(4A) of the Act a

statutory presumption arises and it is for the person from whose possession the seizure has been effected to explain the document and its contents. Neither the assessee nor her husband have produced the person who is supposed to have made the noting.

16 Section 69 of the Act provides that in case of investments which are not recorded in the books of account, if any, maintained by assessee, and the assessee offers no explanation, or explanation offered by the assessee is not satisfactory in the opinion of the Assessing Officer, the value of the investments may be deemed to be income of the assessee for such financial year. In the present case the value of the property reflected in the noting in the seized diary is in excess of the value reflected in the books of account and the explanation offered by the assessee has not been found to be satisfactory by the authorities below and the Tribunal. In these circumstances, the authority is statutorily empowered to deem the difference as

income of the assessee for the year under consideration by exercise of the discretion vested in the authority having regard to the attendant facts and circumstances.

17 The Tribunal has rightly taken note of the fact that except for denying as to who is the person who has made noting in the diary neither the assessee nor her husband have indicated the name of the person who had written such a note in the seized diary. It is apparent that such a person could be only a person closely connected with assessee or her husband and in whom the assessee or her husband would repose confidence so as to permit such a person to make noting of such a nature. Therefore, the statement by the assessee and her husband that they are not aware of the person who had made noting is not acceptable being against human probabilities and the natural course of events.

18 The document of sale was executed in favour of the assessee on 31.8.1984. Form No.37G was

submitted at the said point of time. The Authority had no material to doubt the veracity of the facts stated. The diary was seized on 6.11.1985 when the search took place. Therefore, on the solitary ground that no acquisition proceedings were initiated, the assessee cannot succeed in face of other cogent evidence which has come on record.

19 In these circumstances, the impugned order of the Tribunal does not suffer from any legal infirmity and the findings of facts recorded after appreciation of evidence on record do not merit interference for the simple reason that the assessee has failed to place any evidence on record to show that the position was to the contrary.

20 Accordingly question No.3 is answered in the affirmative i.e., in favour of the revenue and against assessee.

21 To summarise :

[i] The Tribunal was not right in holding that the assessee could not reagitate the point regarding

reopening of the assessment under Section 147(a) of the Act as there could be no waiver of a mandatory condition relating to jurisdiction;

[ii] the Tribunal was right in law in holding that the reassessment proceedings had correctly been initiated and the Assessing Authority had jurisdiction to do so;

[iii] the Tribunal was right in confirming the addition of Rs.1,85,900/- representing difference between the purchase price reflected in the sale deed and as recorded in the seized diary.

22 In the result, the Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-
(D.A.Mehta, J)

Sd/-
(H.N.Devani, J)

m.m.bhatt